



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 48 OF 2017**

**(FORMERLY NAKURU 71 OF 2013)**

**SAMUEL M WANG'OMBE.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHARLES MURIITHI NYAMU.....DEFENDANT/RESPONDENT**

**RULING**

1. A ruling to the application dated the dated 8<sup>th</sup> February 2017 wherein the Applicant herein sought for orders that the firm of Nderitu Komu be granted leave to come on record for the plaintiff in place of M/s Kimatta & Co. Advocates and further that the court be pleased to set aside the orders of 13<sup>th</sup> November 2017 that dismissed the Plaintiff's suit, was delivered on the 19<sup>th</sup> December 2018 wherein the court struck out the Notice of Change of Advocate dated the 29<sup>th</sup> January 2018 together with the Notice of Motion of even date and the Application dated the 8<sup>th</sup> February 2018 all filed by the firm of Nderitu Komu Advocates with costs to the Defendant/Respondent.
2. Following the delivery of the said ruling, the firm of Nderitu Komu Advocates filed yet another Notice of Motion dated the 28<sup>th</sup> November 2018 wherein they sought leave to come on record for the Plaintiff in place of M/S Kimatta & Co Advocates.
3. The said Application was supported by an affidavit sworn by the Plaintiff and on the grounds on the face of it.
4. That whereas service of the hearing Notice to the Plaintiff's previous Counsel M/S Kimatta & Co Advocates (see the affidavit of service dated the 18<sup>th</sup> December 2018) elicited no response, the Defendant's Counsel on the other hand filed a Preliminary Objection dated the 3<sup>rd</sup> December 2018.
5. A look at the Application before me the same is clear that M/S Nderitu Komu Advocates have sought to come on record so as to represent the Plaintiff in place of counsel on record M/S Kimatta & Co Advocates.
6. The Defendant's Preliminary Objection which was supported by the grounds therein and the replying affidavit filed on the 14<sup>th</sup> December 2018 was to the effect that the said application offends the laid down mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules especially since he sought to come on record after judgment was entered. Secondly, that the present application was a duplicate of the previous application dated the 8<sup>th</sup> February which was struck out.
7. That the said application was not served upon the Plaintiff's Counsel as is required but rather the Plaintiff served his counsel with the hearing Notice of the application.
8. That the Application was fatally incurable as the firm of Nderitu Komu Advocates were not properly on record and had no legal standing to move the court on behalf of the Plaintiff
9. That the said application was therefore frivolous, vexatious bad in law as the plaintiff were clearly abusing the court process in denying the defendant to enjoy the fruits of his judgment. They sought for the Application to be dismissed.
10. I have considered the Application herein as well as the Preliminary objection and its grounds therein as well as the replying affidavit.
11. The Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** has defined A preliminary objection as:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘ . . . .a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

12. The summation of the Defendant/Respondent’s Preliminary Objection is that this application offends the provisions of Order 9 rule 9 of the Civil Procedure Rules in that the same makes it mandatory for any change of an advocate after judgment has been passed to be effected by an order of the court upon an application with notice to all parties or upon consent filed between the outgoing Advocate and the proposed incoming advocate. involves the issue

13. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

*When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—*

*(a) upon an application with notice to all the parties; or*

*(b) upon a consent filed between the outgoing advocate and **the proposed incoming advocate or party intending to act in person as the case may be**”*

14. In essence, the provision of Order 9 Rule 9 of the Civil Procedure Rules stipulate that where there is change in representation of a party, who had *previously been represented by counsel, after judgment has been passed, such change shall not be effected without an order of the court. The party seeking to come on record must seek leave to do so. That after leave has been sought, the party coming on record shall then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court.*

15. Unlike the previous application wherein counsel had sought leave to come on record and at the same time to set the orders of 13<sup>th</sup> November 2017 aside, I find the present application had conformed to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

16. The Preliminary objection dated the 3<sup>rd</sup> December 2018 is herein dismissed with costs.

17. I allow the said application and direct that Nderitu Komu Advocates files and serves his notice of change within 14 days upon delivery of this ruling

**Dated and delivered at Nyahururu this 4<sup>th</sup> day of February 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**